II. THE RECORD DEMONSTRATES THAT AMIDST THE EXPLOSION OF MEDIA, TEE RULE PREJUDICES NEWSPAPERS – TEE MEDIUM MOST COMMITTED TO LOCAL NEWS.

A. The Media Marketplace Has Experienced Dramatic Growth, Rendering Traditional Media Vulnerable To New Competitors.

Advocates for retention of the Rule and those favoring its repeal agree the number of media outlets in communities across the nation has exploded since the Rule's adoption The Commission makes note of this fact in the Notice and media owners in markets large and small provide substantial data describing the increases in programming diversity and competition that have occurred since 1975.[26]

All of the commentary and data also concur that newspaper circulation and television ratings have suffered significant declines as a result of the emergence of new media competition, principally from cable/satellite and the Internet." Today, cable competes for and wins a significant share of the most popular programming available." Using its dual revenue streams, cable can simply outspend over-the-air broadcasters for key programming. For example. in January 2002 the National Basketball Association signed $4.6 billion rights agreements with Disney (ESPN, ABC) and AOL Time Warner (TNT). In an historic shift, ABC will air only 15 regular season games plus five early-round playoff games and the NBA Finals. All other games,

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[26] See. e.g., Comments of New York Times Company at 2-7; Commenu of Belo Corp. at 8-9; Comments of Moms Communications Corporation at 16-23; Comments of The Hearst Corporation at 5-12; Comments of The Media Institute at 5-6; and numerous others. Defenders of the Rule focus on consolidation of ownership, but admit that as measured by the number of voices, public discourse is more robust today that it was when !he Rule was adopted. See. e.g., Comments of The office of Communication, Inc. of The United Church of Christ, National Organization for Women and Media Alliance (collectively "United Church of Christ. et. al"), at 4 (showing growth in number of radio stations).

[27] See. e.g., Kathy Bergen, TV news' sacred status now old story, Chi. Trib. .Feb. 10, 2002, Business at 1

[28] In coverage of news in general, and America's War on Terrorism in particular, more and more Americans are turning to cable networks instead of over-the-air stations. *See, e.g.*, Mark Jurkowitz, In TV news, this is war. Networks may be losing the battle as more viewers turn to cable counterparts, Chi. Trib., Dec. 18, 2001, Tempo at

Continued)

including the All-star game and conference finals, will be carried exclusively on ESPN, TNT and a newly-formed cable channel owned jointly by the NBA and AOL Time Warner. Following the trend of Major League Baseball, the NBA recognized "the difference in distribution is dwindling From broadcast to cable. For anyone truly interested in watching these games, they won't be difficult to find.""

As the Commission acknowledged last month, viewers are following the programming to cable or another form of multichannel video programming delivery service ("MVPD") In January, the Commission announced pay TV subscribers jumped 4 6% in the year ending June, 2001, with growth in satellite service outpacing cable by more than double." More than 88 million U.S. households subscribe to some MVPD and the broadband audience has surpassed 21 million." Cable/satellite subscriptions in many communities approximate total coverage. In Hartford, Connecticut, more than 88% of television viewers subscribe to cable or another MVPD, making any discussion of the over-the-air television marketplace a hypothetical exercise. Internet sites provide additional competition without providing local news.[32] And as the Commission's January report suggests, these trends will continue

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[29] Ed Sherman, Cable snares bulk of games; ABC joins ESPN. TNT in package, Chi. Trib., Jan. 23,2002. Sports at 7. quoting ESPN's George Bodenheimer (ESPN and TNT were able to pay the NBA 25% more than the incumbent broadcast network NBC in the 2002 pact. "The NBA had to go the cable mute in order to generate the increase NBC came in with a substantially lower bid after claiming it lost $300 million during the last two seasons of the current deal."). *See also*, Stefan Fatsis, Broadcast Bounce: NBA's Pact With AOL, Disney Puts Most Games in Cable's Court, Wall St. J., Dec. 17, 2001, § B at 6.

[30] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (CS Docket 01-129) Jan. 14.2002, at ¶ 6. See *also*, Reuters, Pay television subscriber numbers up 4.6% - FCC, Jan. 14.2002

[31] Nielsen/NetRatings, Broadband audience surpasses 21 million in November, setting a record high, according to Nielsen NetRatings, (Nov. 2001).

[32] Diversity and competition, the two principles supporting the Rule. *may* actually k a t odds in today's media

(Continued)

B. Rising Newsgathering Costs Jeopardize Viewpoint Diversity And Cross-Ownership Provides A Remedy.

Both sides of the debate acknowledge the cost of producing a unique television newscast has escalated dramatically since the Rule's adoption.[33] Those supponing the Rule lament "the dramatic decline in the rate at which TV stations have news operations."[34] It is also noted that some stations now opt to "outsource" their newscasts or use pooled news services, all of which lead to content homogenization." Ironically, these maladies have occurred since the Rule was adopted and cross-ownership banned. In fact, Tribune's comments offer a candid example of this economics of news dilemma and illustrate how cross-ownership is the remedy to this phenomenon.[36]

Tribune's comments describe its interest in launching a new newscast in South Florida. There, Tribune owns both the news-rich Sun-Sentinelnewspaper and the seventh-rated television station, WBZL. After acquiring WBZL in 1996 as part of a six-station transaction, Tribune sought a permanent waiver of the cross-ownership rule, but agreed to a temporary waiver that prohibited sharing of news resources, even though WBZL did not produce a newscast at that time. In effect, the terms of the waiver extinguished the possibility WBZL could launch a new newscast using the resources of the *Sun-Sentinel*. Instead, WBZL has opted for the financially

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marketplace. For instance. classified advertising – a major revenue source for newspapen – is being eroded by online competitors such as Monner.com, Autobytel and Homehunter.com. Advocates of the Rule admit these new media operations do not significantly contribute to the marketplace for local news. That is. they do not measurably contribute to diversity of local voices. However, such entities clearly add to the competition facing newspapen. They take revenue and the resulting financial impact on newspapers merely advantages these companies that do not inform the public or add to the marketplace of ideas.

[33] See. *e.g.*, Comments of Consumers Union, et. al, at 80. See *also*, Kathy Bergen, TV news' sacred status now old story, Chi. Trib. Feb. 10,2002. Business at 1.

[34] Comments of Consumers Union, et. al, at 80.

[35] *Id.* at 57-58.

prudent carriage of a newscast produced by a competing television station in the market and viewers in South Florida are deprived of an independent television newscast,

C. The Rule Is Biased Against Newspapers.

None of the comments deny newspapers play an important role in informing our citizenry and are committed to covering news at the local level." The record also demonstrates how broadcast stations under common ownership with a newspaper produce significantly more local news.[38]

Yet while both sides agree on the importance of newspapers to an informed public, advocates of the Rule's retention reach the incongruous conclusion that diversity and the quality of news coverage will improve if the Commission continues to deny broadcast ownership to enterprises that by their nature are the most committed to local news. If this were true, one might expect greater quality local coverage in markets without grandfathered combinations. But there is no evidence of such, in this record or otherwise. For example, proponents of the Rule do not claim that Washington, D.C. with no remaining grandfathered combinations, has better local news coverage or diversity because of it, than does Chicago, New York, Atlanta, Dallas or Los Angeles

Nor do they claim – because they cannot – that lack of diversity is a major problem with local news. As demonstrated in the filings of Tribune, Gannett Co., Inc , The New York

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[36] Comments of Tribune Company at 43, 49-50.

[37] See supra note 1. See also. Comments of Consumers Union, et. al, at 61-62 ("Television does not perform the same function as newspapers and neither replaces radio. Broadcast does not compete effectively with newspapers in the news function. Newspapers provide a different type of information service with different impact . . . than video or radio, with much longer and in depth treatment of issues. In this they have adopted to a role distinct fmm television.").

Times Company, The Hearst Corporation, Moms Communications Corporation, Belo Corp., Cox Enterprises, Inc., E.W. Scripps Company, and others, common ownership actually increases the amount, quality and viewpoint diversity of local news and public affairs programming. Common ownership spurs broader local television news coverage over the air in the same way it has given birth to local all-news cable channels, such as ChicagoLand Television News.

Those who oppose any change to the Rule would do well to remember that the goal of the Rule is not to prohibit newspaper publishers from owning television stations, but to increase the diversity of voices and the level of local news in the marketplace – a goal that is impaired by this timeworn regulation.

III. OUTDATED THEORIES OF SOURCE DIVERSITY ARE NOT SUPPORTED BY THE RECORD.

Proponents of the Rule today base their arguments on hyperbole and hypothesis, rather than facts. They have adopted new names for the theories propounded in the past, such as "Empirical Concept of Diversity"[39] and "institutional diversity"," however, at their essence, these theories simply restate the aged source diversity theory that launched the Rule in 1975.[41] Offering no basis in fact or experience, these theories allege that increasing the number of broadcast station owners necessarily yields diverse viewpoints, while concentrated ownership results in viewpoint repetition.

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[38] See. *e.g.*, Comments of Media General at 11 and Appendix 5; see *also*, supra, note 2.

[39] Comments of Consumers Union *et.* al, at 50.

[40] *Id.* at 51.

[41] See. *e.g.*, *id.* at 53; Comments of the United Church of Christ, *et.* al, at 15.

The fallacy of the source diversity theory is demonstrated above and in Tribune's earlier comments. As described above, the economic realities of newsgathering have caused all news operations, whether independent or commonly owned with other newspapers or broadcast stations, to consider pooling news with competitors or outsourcing their news operation altogether In South Florida, for example, NBC programs newscasts on three stations, including Tribune's WBZL, while CBS programs newscasts on two stations. Similarly, as demonstrated by the FCBJ article and Tribune's comments, television stations and newspapers do not speak with one voice simply because they are commonly owned

News operations often expand in cross-owned markets" and other programming diversification occurs in search of new viewers. Recently, the trend toward more targeted programming took another step as Viacom announced it was exploring a gay-oriented TV channel for what the company called an "underserved audience niche."[43] Also last month, Univision launched a new network, Telefutura, with special appeal to bilingual audiences. These efforts underscore the incentive of major media companies to develop content that serves diverse communities. This stands in strong contrast to the allegation by those who support the Rule that larger media companies produce only homogeneous content.

What the proponents of the Rule seem to desire is a guaranteed outlet for every view." Some even suggest the resuscitation of the Fairness Doctrine, the Political Editorial Rule

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[42] For example, despite the large investigative staff at the *Chicago Tribune*, Tribune's WGN-TV established a *new* investigative unit in July 2000. This unit pursues *news* investigation independent of the newspaper.

[43] Associated Pres. Media giant may launch gay channel, Chi. Sun Times. Jan 15.2002. Features at 36.

[44] *See, e.g.* Comments of Consumers Union et. al, at 52 ("Under the First Amendment we *can* never tell people what to *say,* and we certainly *cannot make* them listen, but under the Communications Act and to serve our Constitutional principles we *can* organize the structural rules of the industry to increase the probabilities that more people will engage in civic discourse.").

and the Personal Attack Rule." These theorists refuse to recognize that the American system entrusts the private sector with the role of qualifying viewpoints and leaves the marketplace as the guarantor of viewpoint diversity. In today's multiple-media environment, with myriad sources and outlets for content, and varied and diverse consumer groups demanding news and information targeted to meet their needs and interests, the market will work. The elimination of the Rule will only facilitate a free market.

IV. THE LEGAL FRAMEWORK PROPOSED BY ADVOCATES OF THE RULE PERVERTS THE FIRST AMENDMENT AND IGNORES THE LIMITED CONSTITUTIONAL BASIS FOR NEWSPAPER/BROADCAST REGULATION.

Perhaps most troubling about the legal analysis asserted by those who would retain the Rule is the failure to address the evaporation of the scarcity doctrine – the now-obsolete premise of the Rule. The once limited (scarce) broadcast spectrum arguably heightened the need to preserve diversity among existing voices. In today's marketplace, the concept of scarcity that supported the Rule is outdated. and the Supreme Court has hinted it would recognize as much in this media landscape.[46] As new media and MVPDs dominate the landscape, the limitations of a scarce broadcast spectrum – the Constitutional linchpin for the Rule – have been eliminated.

Advocates for retention cite decades-old precedent, and rely on legal framework based on a media marketplace that no longer exists. They prop up scarcity around the edges – inaccurately claiming that the Internet does not attract viewers away from newspapers or

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[45] *See* Comments of The United Church of Christ at *20.*

[46] FCC v. League of Women Voters, *468* U.S. 364. 376 & n.11, *appeal dismissed,* 468 U.S. 1205 (1984) (noting the scarcity rationale "has come under increasing criticism in recent years" and highlighting those who argue the availability of cable and satellite television technology render the doctrine "obsolete"). *See also.* News America Publishing, Inc., v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) (The Supreme Court "has recognized that new technology *may* render the [scarcity] doctrine obsolete – indeed, may have already done so.").

broadcasters.[47] But they cannot challenge the facts that show more and more consumers get news and information from sources other than the daily newspaper and the local broadcast station." In short, the antiquated concept of scarcity is not defended because that scarcity no longer exists

The Constitution and the Telecommunications Act of 1996 squarely place the burden of persuasion on advocates of continued regulation. The Rule has been in place for 27 years, and conjecture, speculative gain and predictions of doom can no longer serve as its basis More than a quarter century of facts and experience now demonstrate the impact of the Rule and the results of common ownership in grandfathered markets – and this evidence clearly shows that in today's marketplace, common ownership does not harm diversity

> "Where the agency applies [a general] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy."[49]

Section 202(h) of the 1996 Telecommunications Act directs the Commission to review all its ownership rules biennially to determine if they "are necessary in the public interest as the result of

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[47] See. *e.g.*, Comments of Consumers Union. et al, at 9

[1] See. Commenu of Tribune Company. at 10 and 31-34 (demonstrating decline in readership and viewership of traditional media as new alternatives fragment the marketplace). Also, the most recent study of online usage found that among those who use the Internet at work, Internet usage exceeds newspaper usage in every daypart and exceeds all other media except radio in the morning TV in the evening and magazines in the early evening (pre-prime time), in terms of time spent during various dayparts. *See*, Online Publishers Association. Topline Summary. Media Consumption Study, conducted by Millward Brown Intelliquest (Jan. 2002), available at www.online-publishers.org.

[49] Bechtel v. FCC, 957 F.2d 873.881 (D.C. Cir. 1992), *quoting* Pacific Gas & Elec. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974). For a good discussion of this paint, see, Comments of the Newspaper Association of America at 89-92, *citing* 1998 Biennial Review Report, 15 FCC Rcd at 11151 (Separate Statement of Comm'r Michael K. Powell).

competition."[50] This law requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." Accordingly, the Commission must presume there is no need for regulation and justify any portion of the Rule it opts to retain. Absent evidence the cross-ownership rule is necessary to preserve competition and diversity, and is narrowly crafted to achieve those objectives, the Commission cannot maintain the Rule.

In *Bechtel v. FCC*, the Court of Appeals concluded the Commission had an obligation to consider and explain whether its longstanding policy favoring integration of ownership and management in comparative licensing hearings was still in the public interest in light of other regulatory changes." The Court said "it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed'."[52] The Commission, the Court noted, "should stand ready to alter its rule if necessary to serve the public interest more fully."[53]

Those who oppose any change to the Rule ignore the law, cite to legal references that begin "in the abstract, . . ."[54] and wrongly conclude that in this proceeding the burden of proof is on those advocating unburdening the First Amendment. Even so, they do not contest that absent a compelling public interest or any facts that demonstrate a need for its restrictions. the Rule would fail. Here, there is no evidence the Rule is necessary or serves the public interest and the Commission's conclusion is self-evident.

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[50] Pub.L. 104-104 § 202(h), 110 Stat. 111-12 (19%).

[51] Bechtel v. FCC. 951 F.2d at 881.

[52] *Id.* at 881. *quoting* WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981).

[53] Bechtel v. FCC. 957 F.2d at 881, *quoting* FCC v. WNCN Listeners Guild, 450 U.S. 582.603 (1981)

[54] Comments of Consumers Union. et. al, at 23, citing Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm, 463

(Continued)

V. CONCLUSION: TOTAL ELIMINATION OF THE RULE IS THE ONLY OUTCOME JUSTIFIED BY THE RECORD.

The Commission adopted the Rule more than a quarter century ago in the face of an impressive and consistent record of newspaper publishers' civic-minded stewardship of broadcast stations. As in 1975, the facts in this proceeding support the benefits of allowing newspaper publishers to own radio and television stations. The evidence is uncontroverted: common ownership means more news, more local coverage and nothing in the record suggests commonly-owned markets practice viewpoint constriction, suppression or censorship.

Since 1975, the information marketplace has exploded and diversified, and the world has changed. Now it is time for the Rule to change. The 1996 Act was adopted to expunge this regulatory relic, and in a system where individuals and private entities are allowed freedom of speech, that Freedom ought not differentiate among individuals merely because one might own a printing press. Absent decisive Commission action, the Courts will provide a remedy, as it is all but conceded that the Rule will not pass Constitutional muster in the 21st Century

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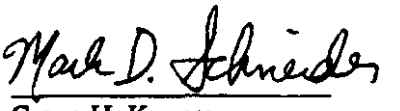
U.S. 29 (1983).

For the foregoing reasons, Tribune asks the Commission to eliminate the Rule in its entirety. Tribune adopts and incorporates the comments of the Newspaper Association of America and the National Association of Broadcasters, among many others advocating elimination of the Rule

Respectfully submitted,

TRIBUNE COMPANY



Crane H. Kenney
Michael R. Lufrano
Charles J. Sennet
Tribune Company
435 N. Michigan Avenue
Chicago, Illinois
(312) 222-9100

R. Clark Wadlow
Mark D. Schneider
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington. D C. 20005
(202) 736-8215
Its Attorneys

Dated: February 15,2002

Attachment B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Cross-Ownership of Broadcast Stations And Newspapers	)	MM Docket No. 01-235
Newspaper/Radio Cross-Ownership Waiver Policy.	)	MM Docket No. 96-197

COMMENTS OF TRIBUNE COMPANY

Crane H. Kenney
Michael R. Lufrano
Charles J. Sennet
Tribune Company
435 N. Michigan Avenue
Chicago, Illinois
(312) 222-9100

R. Clark Wadlow
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8215
Its Attorney

December 3, 2001

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In the Matter of Cross-Ownership of Broadcast Stations And Newspapers	)	MM Docket No. 01-235
Newspaper/Radio Cross-Ownership Waiver Policy.	)	MM Docket No. 96-197

COMMENTS OF TRIBUNE *COMPANY*

Tribune Company ("Tribune."), the corporate parent of 23 major market television stations, four radio stations and eleven daily newspapers, hereby files the following Comments in response to the Notice of Proposed Rule Making ('Notice") issued by the Federal Communications Commission ("FCC" or "Commission") reviewing, inter alia, the daily newspaper-broadcast common ownership rule (the "Rule" or the 'newspaper cross-ownership rule"), codified at 47 C.F.R. § 73.3555(d)(2000).[1]

[1] Tribune. through subsidiaries, owm and operates the following television stations: WPIX, Channel 11. New York: KTLA. Channel 5. Los Angela: WGN-TV. Channel 9, Chicago: WPHL-TV, Channel 17. Philadelphia: WLVI-TV, Channel 56. Cambridge. Massachusetts; KDAF, Channel 33, Dallas: WBDC-TV, Channel 50. Washington, D.C.: KSWB-TV, Channel 69. San Diego; WATL. Channel 36. Atlanta; KHWB, Channel 39. Houston; KCPQ, Channel 13, Tacoma. Washington: KTWB-TV, Channel 22. Seattle; WBZL. Channel 39. Miami; KWGN-TV. Channel 2, Denver; KTXL. Channel 40, Sacramento. California; WXIN, Channel 59. Indianapolis; WTIC-TV, Channel 61, Hanford, Connecticut; WTXX Channel 20. Waterbury, Connecticut; WXMI, Channel 17, Grand Rapids. Michigan; WGNO. Channel 26, New Orleans: WNOL-TV, Channel 38. New Orleans: WPMT, Channel 43, York. Pennsylvania: WEWB, Channel 45, Schenectady, New York. Through subsidiaries, Tribune also publishes the following daily newspapers: *Los Angeles Times*, Los Angeles; *The Chicago Tribune*. Chicago; *Newsday*, New York; *The Baltimore Sun*, Baltimore; *The Hanford Courant*, Hanford. Connecticut: The *South Florida Sun-Sentinel*, South Florida: *The Orlando Sentinel*, Orlando. Florida: The *Daily Press*, Newport News, Virginia: *The Morning Call*, Allentown. Pennsylvania; The *Advocate*, Stamford. Connecticut; *Greenwich Time*, Greenwich. Connecticut. Tribune also owns. through subsidiaries. WGN(AM), Chicago: KEZW(AM), Aurora. Colorado: and KKHK(FM) and KOSI(FM), Denver. See Tribune Company 2000 Report. available at www.tribune.com/report2000/tc2000ar19.html.

I. **SUMMARY** AND INTRODUCTION.

Within hours of the September 11 attacks on America, Susan Harrington and Diane Goldie, reporters for Tribune's *Newsday* newspaper, were on the telephone with Tribune television stations providing eyewitness accounts of the tragedy at the World Trade Center. In the days following the attacks, *Newsday* reporter Edward A. Gargan reported live from Pakistan to New York viewers over Tribune's WPIX. As stations across the country broadcast common network coverage of the terrorist attacks and their aftermath, WPIX and Tribune's other television stations used Tribune newspaper reporters to expand the public discourse by providing a local perspective of these historic and tragic days – a perspective produced by people from the local community.

Also on September 11, for the first time in its 154-year history, the *Chicago* Tribune delivered a special afternoon edition to the doorsteps of every one of its subscribers in the Chicago area. As the demand for news peaked, the newspaper elected to absorb a cost of more than $167,000 to produce a special edition - with no advertising – to meet the demands of its readers for news and information. In the current economy, as publishers suffer through the worst advertising environment since the Great Depression, such additional cost cannot be justified financially. It is justifiable only by a newspaper's commitment to its community and to delivering the news.

The news coverage of the events of September 11 and of the war on terrorism demonstrate how the media marketplace has changed dramatically since adoption of the newspaper/broadcast cross-ownership Rule in 1975. Never before has the American public had access to such a wide array of choices among sources of information. In 1975, the local media marketplace was a handful of shops in the village square: a few television stations, perhaps a dozen radio stations, and a daily newspaper or two. Today's marketplace is the modem mega-mall, a smorgasbord of television and radio stations. cable channels and Internet sites offering all manner of news, views and entertainment programming for targeted audiences and cultures; instantaneous access to local and distant newspapers, magazines, encyclopedias, and Internet-only news services on the World Wide

Web: scores of national, international and local program services available over multichannel video program distributors such as cable and DBS; local daily and weekly newspapers, and a choice of national newspapers.

When it adopted the Rule in 1975, the Commission found newspaper publishers had a long record of public service and had provided more news and public affairs programming than other licensees. It had no evidence of actual harm from cross-ownership. Nonetheless, the Commission adopted the Rule in the hope it would foster some gain in diversity. The Supreme Court later predicted, correctly, that technological advances could obviate any perceived need for the Rule.[2]

Today, the market underscores the prescience of the Supreme Court's prediction. Never before has the media marketplace been so fragmented and so clearly incapable of domination. And never before have the providers of news and information had such need to be free of outmoded and unnecessary restrictions in order to be heard and to remain viable. As the media marketplace has fragmented, the ratings of individual broadcast stations and the circulation of individual newspapers have declined. At the same time, the costs of gathering news and of procuring programming have risen exponentially. This has put great pressure on news providers to maximize the use of their resources or reduce the scope of their coverage.

Tribune has 77 years of experience operating newspapers and over-the-air broadcast stations in Chicago[3] These Comments focus on the five markets where Tribune has such combinations today: New York, Los Angeles, Chicago, South Florida, and Hartford.[4] Each has had an explosion in

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[2] FCC v. League of Women Voters, 468 U.S. *364.316* n.11 (1984). The Supreme Court acknowledged it might need to reconsider rules premised on the scarcity doctrine upon "some signal from Congress or the FCC that technological developments have advanced to far that some revision of the system of broadcast regulation may be required."

[3] The *Chicago Tribune* is in its 155th year of publication: WGN(AM) went on the air in 1924: WGN-TV first broadcast in 1948.

[4] Tribune's cross-ownership in Chicago (*Chicago Tribune* and WGN-TV). has been grandfathered under the Rule since its adoption. Tribune's cross-ownership in South Florida (*South Florida Sun-Sentinel* and WBZL) is pursuant to a temporary waiver pending the outcome of this proceeding. See 1998 Biennial Regulatory Review, 15 FCC Rcd. 11058, 11109 (2000). In

television and radio stations, cable systems and other MVPDs, and national and locally tailored Internet sites since 1975. Each has fierce competition among publishers of daily and weekly local newspapers.

This competitive marketplace, not the Rule, is the best guarantor of diversity. Tribune's experience illustrates how cross-ownership actually increases the amount, quality and viewpoint diversity of local news and public affairs programming, and how common ownership is an asset not only to media companies but also to the public.

Tribune's experience also illustrates how the Rule is unnecessary and, worse, how it actually harms diversity. The Rule denies broadcast ownership to local newspapers, the entities which are the most dedicated to providing local news. Moreover, the Rule ignores the significant entry barriers that make launching a new local newscast impractical for most over-the-air stations. Tribune's experience in South Florida illustrates how the Rule discourages new voices: the temporary waiver allowing Tribune to purchase WBZL(TV), Miami, was conditioned on the station being held entirely separate from Tribune's Sun-Sentinel newspaper, published in Ft. Lauderdale, Florida. As a result, instead of creating a new voice, WBZL carries a news program produced by mother television station in the market.

Joint ventures are not the answer. While they are permitted under the Rule, they seldom. if ever, realize the full potential of common ownership. The reality is that a joint venture never has the same commitment to capital and human resources as a wholly owned combination.

Given the realities of today's marketplace. the Rule is unconstitutional. The deferential standard of review under which the Rule was previously judged was premised on scarcity in the marketplace.' Yet the Commission itself has found scarcity no longer relevant, undone by the mainstream adoption of cable as the dominant video delivery system. Indeed, the abundance of choices

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New York (*Newsday* and WPIX), Los Angeles (*Los Angeles Times* and KTLA). and Hanford (*The Hanford Courant*, WTXX and WTIC-TV), Tribune acquired the newspapers in lune of 2000 and is expressly permitted, under applicable Commission policy. to hold those cross-ownerships until the next station license renewal dales. Amendment of Section 73.34. 73.240 and

in the media marketplace has led the Commission to curtail so many other ownership restrictions that the Rule now impermissibly discriminates against newspapers – which, ironically, are entitled to the highest degree of First Amendment freedom. As demonstrated in the recent invalidation of the cable ownership limits, the courts provide a viable remedy if. through this proceeding. the Commission refuses to unlock the time capsule that has preserved the Rule for the past 26 years.

Finally, repeal of the Rule would serve the public interest better than any of the other options proffered by the Commission. Standards based on market concentration or voice counts, a "structural separation" requirement, or a liberalized waiver policy all suffer from a number of legal, administrative and constitutional flaws. Most notably, they would all necessitate increased Commission activity as a regulator of newspapers – an area not within its jurisdiction.

Until now, the Commission has been unable' or unwilling to extend its recognition of the new media landscape to allow broadcasters and publishers to combine. Given today's marketplace, the Commission should allow broadcasters to pursue the same programming efficiencies with news-committed newspaper publishers that it allows to occur within the broadcasting and cable industries. Failure to level the playing field so newspapers can compete with vertically and horizontally aligned broadcasters and cable operators will jeopardize the production of the news, children's, and public affairs programming the Commission has recognized serves the public interest.

Accordingly, the Commission should repeal the Rule.

73.636 of the Commission's ; Relating to Multiple ;hip ; Standard FM and Television Broadcast Stations, 50 FCC, 2d 1046 at n.25 (1975) ("Order").

[5] From 1987 until 1996. Congress precluded the review of the Rule by prohibiting the Commission from using its funding to address any review. The unusual appropriations restriction intentionally shackled the Commission and forced if to continue the ban on newspaper publishers owning local television stations. regardless of whether h e ban was necessary or justifiable. See. e.g. Pub. L. No. 100-102, 101 Star. 1329 (Dec. 22. 1987).

II. THE RULE IS GROUNDED IN PERCEPTION, NOT FACT.

As the Commission considers the first revision to the Rule since its adoption 26 years ago, it is appropriate to begin by considering the fragile rationale used to bring the Rule into being in 1975. The Commission has often stated its laudable goals of enhancing viewpoint diversity, economic competition and quality programming services.[6] In adopting the Rule, the Commission sought to further these goals in much the same manner it did when it adopted bans against ownership of multiple radio stations and radio/television combinations in a single market.

However, the evidence obtained during the public rulemaking process provided little, if any. support for the Rule. Instead, *the* evidence showed broadcast stations owned by newspaper publishers had a "long record of service" in *the* public interest and produced a larger percentage of news, public affairs and other public service programming than did independently-owned stations.' The Commission also found newspaper owners should be credited for their pioneering efforts to launch both radio and television broadcasting.' Most importantly, *the* Commission did not find newspaper-broadcast combinationsspoke with one voice. nor did it find such combinations were harmful to competition. In fact, *the* Commission expressly *stated* it found no pattern of abuse in existing cross-owned markets.'

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[6] Order, 50 FCC 2d at 1074. The Commission stated the twin goals in adopting multiple ownership rules were to enhance viewpoint diversity and economic competition. Later the Commission prioritized these goals and identified a third interest, stating that economic competition must sometimes yield to 'the even higher goals of diversity and *the* delivery of quality broadcasting service to the American public." See also, Cross-Ownershio of Broadcast Stations and Newspapers, MM Docket No. 01-295 at ¶ 14 (2001). (" NPRM") ('the Commission adopted the newspaper/broadcast cross-ownership rule largely to promote and protect a diversity of viewpoints."). Id at ¶ 40 (diversity of viewpoints in local news presentation is at the heart of the Commission's diversity goal).

[7] Order at 1078 (¶ 109)

[8] Order at 1074.

[9] FCC v. National Citizens Comm. for Broad.. 436 U.S. 775. 786 (1978).

These conclusions are not surprising, and are in fact consistent with the Commission's similar findings in its 1941 investigation of broadcasting/newspaper cross-ownership issues." What is surprising is the Commission's reaction to the vacuum of evidence it had in 1975: Despite the absence of any showing that commonly-owned media engaged in viewpoint constriction or anticompetitive practices, the Commission concluded that "even a small gain in diversity" justified adoption of the Rule." In effect, the Commission decided to play a hunch that diversity would be enhanced, possibly by only the smallest of margins, by adopting the Rule.

The wisdom of adopting a sweeping proscription for such a speculative and incremental advance is now belied by a quarter-century of experience. What is most striking, however, is the unintended harm the Rule has wrought on the public interest principles it was adopted to protect. Tribune's experience in the past 26 years illustrates how the Rule weakens viewpoint diversity, reduces the quality of public interest programming and jeopardizes competition. The following sections highlight the vast number of media choices now available to the public. with special emphasis on media markets where Tribune owns both a newspaper and a television station. In doing so, they illustrate the choices available to consumers and the reality that diversity is enhanced by freeing newspapers to add their voice to the din of our nation's broadcast media marketplace.

III. THE FACTS A DRAMATIC EXPLOSION IN MEDIA OUTLETS SINCE 1975.

As the Commission acknowledged in the Notice, the explosion of media voices since the Rule was adopted in 1975 has been deafening. The number of radio and television stations serving

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[10] In March. 1941, the Commission opened a rulemaking intended to curtail radio ownership by newspaper publishers. High Frequency Broadcast Stations (FM), 6 Fed. Reg. 1580 (Notice of Investigation and Hearings March 21. 1941). The FCC conducted hearings for more than a year, including sending investigators into communities to look for news bias on the pan of commonly-owned propenies. A similar study was independently conducted under the auspices of Columbia University. The only problem either study found was that in some small towns. newspapers that owned radio stations refused to print the program schedules of rival stations. Ultimately, the Commission closed the investigation without adopting any cross-ownership rule.

[11] Order at 1076. 1080n. 30.

the public has increased dramatically in the intervening years and new media have emerged to add to the number of programming choices available. The only medium that has not experienced a quantitative expansion is daily newspapers, which have declined in number since 1975 and suffered circulation and readership losses as well.

In 1975, there were 953 full power over-the-air television stations in the U.S. As of June, 2001, there were 1,678 full power stations and 2.3% low power stations." There were 7.785 radio stations on the air in 1975 - 4,432 AM stations and 3.353 FM stations" – and FM radio was just gaining a toehold among the listening public. Today, there are 12,932 radio stations on the air, including 4,716 AM stations and 8,216 FM stations.[14] Of the 286 Arbitron markets in the U.S. today, 85% are served by 10 or more stations and 43% by 20 or more.[15]

The source of the greatest increase in programming options, however, is a medium that was in its infancy in 1975, cable television. For a majority of Americans. turning on the television each day opens the door to scores of cable networks and other programming selected by cable operators. In fact, the majority of Americans watch television via cable – not over the airwaves. The Commission acknowledged this fact when it noted, "cable service is generally available to households throughout the U.S."[16] In 1975, there were 3,506 cable systems in the U.S. with 9.8 million subscribers." Today. some 10,466 cable systems afford nearly 70 million households access to more than 231 cable

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[12] FCC. *Broadcast Station Totals* (July 13, 2001), available at www.fcc.gov.mmb/asd/totals/bt010630.html.

[13] *Broadcasting & Cable Yearbook 2001*, at D-733.

[14] National Association of Broadcasters, *Radio Fast Facts*, available at www.nab.org/radio/radfacts.asp. See also, *Broadcasting & Cable Yearbook 2001*, at D-733 (citing 1/1/01 numbers of 12.717 radio stations, 4.685 AM and 8.032 FM).

[15] *Broadcasting & Cable Yearbook 2001*, at D-719 – D-726 (243 markets with 10 or more stations, 124 markets with 20 Or more).

[16] Review of the Commission's Regulations Governing Television Broadcasting. 14 FCC Rcd. 12903, 12953 (¶ 113) (1999) ("Television Ownership Report and Order").

[17] National Cable Telecommunications Association ("CTA"). *Industry Overview* (2001) available at

networks." Cable penetration in the U.S. is currently 68% and cable is available to 96.7% of U.S. television households.[19]

Other multichannel video program distributors ("MVPDs") have arrived and are adding still more choices for consumers: Direct broadcast satellite ("DBS"), satellite master antenna television ("SMATV"), C-Band satellite dishes, and multichannel, multipoint distribution service ("MMDS") were all virtually nonexistent in 1975. Today, they deliver video programming to about 16.9% of U.S. television households." DBS serves more than 15.5 million subscribers, SMATV has 1.5 million subscribers. C-Band serves more than 1.1 million, and MMDS serves 700,000 subscribers." Combining MVPD with cable, 85% of all U.S. television households use something other than over-the-air television for their video programming reception.[22] Satellite radio is also being rolled out across the country, offering hundreds more choices for news, entertainment and information, and will bring a wide variety of choices to even the smallest towns and most remote parts of the nation.[23]

Driving the rapid acceleration of cable and DBS subscriptions are the advantages of an enhanced picture and, more importantly, an almost endless array of programming choices. The entertainment options are well documented.[24] AOL/Time Warner's TBS Superstation reaches 86.1

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www.ncta.com/industry_overview/indstats.cfm?statID=4. See also, http://users.skynet.be/sky91776/cablesat/cablehisus2.htm.

[18] *Industry Overview,* available at www.ncta.com/pdf_files/Ind_ovrw_060801.pdf, at 14

[19] *Id.*

[20] Number of MVPD users divided by all U.S. television households. Statistics from NCTA. *Industry Overview.*

[21] NCTA. *Industry Overview,* at 11

[22] While a few households may have both cable and some form of MVPD, it is presumed such households are relatively few.

[23] See, e.g., Hugh Panero. chief executive of XM Satellite Radio. which began offering its services to customers this year: 'We intend to do on radio what cable and direct satellite broadcasting did for TV. We plan to offer more choice and quality in programming from coast to coast." Howard Wolinsky, Radio *Finally Dials up High Tech,* Chi. Sun-Times. Nov. 12, 2001, at 55.

[24] Cable and DBS providers attempt to distinguish themselves through marketing campaigns that describe the nearly endless